

*United States Court of Appeals  
for the Second Circuit*



**APPELLANT'S  
REPLY BRIEF**



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UNITED STATES COURT OF APPEALS  
FOR THE  
SECOND CIRCUIT

INTERSTATE COMMERCE COMMISSION )  
Plaintiff-Appellee, )  
and )  
ETHAN ALLEN, INC., VERMONT PUBLIC )  
SERVICE BOARD AND NEW HAMPSHIRE )  
PUBLIC UTILITIES COMMISSION, )  
Intervenors )  
vs. )  
MAINE CENTRAL RAILROAD COMPANY )  
Defendant-Appellant. )

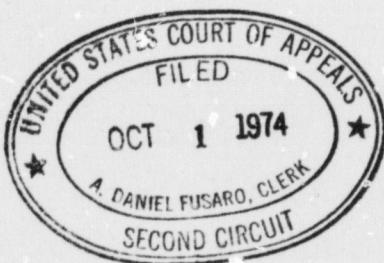
No. 74-2062

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On Appeal From The United States District Court  
For The District of Vermont

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REPLY BRIEF FOR APPELLANT MAINE CENTRAL RAILROAD COMPANY



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REPLY BRIEF FOR APPELLANT  
MAINE CENTRAL RAILROAD COMPANY

I.

The answering briefs of the appellee and the intervenors each make much of the district court's view that Maine Central's suspension of service, coupled with the Railroad's solvency, constitute an "abandonment" within the meaning of 49 U.S.C. §§ 1(18) and 1(20).

We need not belabor the point, made in our opening brief, that the concept of abandonment in the railroad context shares with the application of the concept to other areas of the law the element of intent. The district court deemed Maine Central's intent--and thus the extraordinary dilemma that the ICC's silence and inaction has posed for the Railroad--irrelevant to disposition of the case. The district court and the parties supporting its order hold to the

principle that the ICC, any shipper, state body, or other party in interest has a valid equitable cause of action against any railroad that has suspended service, for any reason, upon showing that the railroad is capable of providing service. Sections 1(18) and 1(20) do not purport to forbid failure by carriers to provide transportation service, but forbid "abandonment." Other provisions of the Interstate Commerce Act, as well as the common law, establish rules governing when it is reasonable and when it is unreasonable for a carrier to refuse to provide service. See, e.g., Johnson v. Chicago, Milwaukee, St.P. & Pacific R. Co., 400 F.2d 958 (9th Cir. 1968), and cases cited therein. The district court's conception of the "abandonment" provisions eliminates all distinction between these two causes of action.

The district court's opinion--and the briefs of appellee and intervenors--thus take the concept of abandonment far beyond this Court's decisions in Zirn v. Hanover Bank<sup>1/</sup> and Meyers v. Jay Street Connecting Railroad.<sup>2/</sup> In Zirn, Judge Frank emphasized that "to 'abandon' in this context means . . . to give up permanently, not merely to suspend operations . . ."

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<sup>1/</sup> 215 F.2d 63 (2d Cir. 1954).

<sup>2/</sup> 259 F.2d 532 (2d Cir. 1958); 288 F.2d 356 (2d Cir. 1961).

215 F.2d at 69; see also, Myers v. Arkansas & Ozarks Ry. Corp., 185 F. Supp. 36, 41 (W.D.Ark. 1960). In Jay Street, the railroad gave notice to all its employees that "their services <sup>3/</sup> would not be needed" and proceeded unilaterally and voluntarily to discontinue service with the vague qualification that it might be resumed at such time as the railroad's financial prospects improved. Under these circumstances it is hardly surprising that the Court did not seriously entertain the railroad's contention that the service suspension was "temporary" --the railroad, after all, was on the verge of ceasing to be a going concern.

This is not a case where "the railroad is directly responsible for the track conditions upon which it premised its embargo," but rather "a situation in which a roadway has been damaged by a natural disaster." ICC v. St. Johnsbury & L.C. Railroad, Civil Action 73-3 (D.Ver., January 25, 1973), slip op. at 5; see also ICC v. Chicago, Rock Island & Pacific R. Co., No. 73-1920 (8th Cir., July 24, 1974), slip op. at 5-6. Maine Central had maintained the damaged line in good condition prior to the floods, so that

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<sup>3/</sup> 259 F.2d at 534. In ICC v. St. Johnsbury & Lamoille County Railroad, Civil Action No. 73-3 (D.Ver., January 25, 1973), slip op. at 3, the railroad followed a like course, by declaring an embargo and then laying off "the majority of its employees."

no intention to abandon can be premised on its pre-flood maintenance. There is no danger that the line will so deteriorate as to make eventual restoration of service impossible.

This case, in sum, is bare of the indications of an intent to abandon that were decisive in the cases relied on by the district court, appellee and intervenors. Only by stretching the concept of abandonment to the breaking point--by eliminating an intent element, by ignoring the ICC's inexcusable delay and refusal to become involved prior to its filing of an injunction suit--can they make a case for injunction.

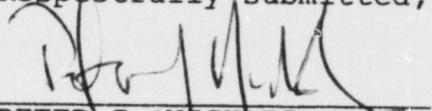
II.

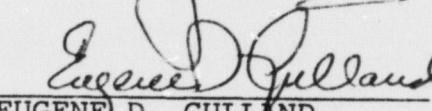
There is no basis for Ethan Allen's gratuitous assertion that there has been "inordinate delay" by Maine Central in complying with the district court's order. (Br. 14.) The record clearly reflects Maine Central's estimate that repair of the embargoed segment would require 2 1/2-3 months. (Tr. 285.) Ethan Allen's allusion to an 8-10 working day estimate refers to a preliminary survey conducted by Maine Central engineers on July 2-3, 1973, within hours after the floods subsided. The purpose of this preliminary survey was to establish how quickly a rather substantial work force could make emergency, temporary, repairs to the segment

adequate to enable special operations at substantially curtailed speeds. Comparable surveys were made for other segments. The preliminary estimate was and is no measure of the time and cost entailed in properly resoring the line to its pre-flood operating condition, which is what the court below ordered Maine Central to do. (Tr. 260-61; 281-85.)

Maine Central is in full compliance with the district court's order. After the completion of preparation work (such as bulldozing) by outside contractors, a Maine Central bridge and building crew began full-time work on the segment on August 14. On approximately August 20, a track gang began full-time work on the line. Next week, additional track men will be assigned, also on a full-time basis, to the line. <sup>4/</sup> Repair efforts are progressing in full accordance with the 10-12 week schedule.

Respectfully submitted,

  
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There is likewise no basis for Ethan Allen's assertion (Br. 13) that most of the repair work can be done by outside contractors with outside labor. Only the site preparation work is done by contractors. The major work--bridge repair and rebuilding, track and right-of-way repair--is borne by Maine Central employees drawn from other lines.

CERTIFICATE OF SERVICE

I hereby certify that I today served all parties to this appeal with copies of Maine Central Railroad Company's Reply Brief in the following manner:

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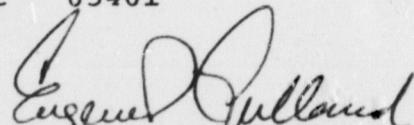
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